IN THE

Supreme Court of the United States

October Term, 1968

No. 311

CONLEY ELECTRONICS CORPORATION,
d/b/a TELEPROMPTER OF LIBERAL, INC.,

Petitioner.

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
for the Tenth Circuit

BRIEF FOR PETITIONER IN REPLY TO OPPOSITION

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ARGUMENT IN REPLY

In opposition to this petition for certiorari and our assertion of infringement upon free speech, the Government responds that the issue was not properly raised before the Commission, and that in any case the Commission's regulation is reasonable and thus overcomes any constitutional impediments. As to the

first point, we have already anticipated and dealt with this in footnote 6, p. 7 of our Petition.[1] Concerning the second point, the Commission, in answer to First Amendment challenges to the non-duplication rule, both here and in its rule making,[2] has relied solely upon *NBC v. United States*, 319 U.S. 190 (1943). Likewise, four circuits reviewing the Commission's CATV rules have singularly relied upon the *NBC* case, without significant re-examination,[3] in validating the acknowledged restraint upon the free flow of broadcast programs. A recent Seventh Circuit Opinion in *Radio Television News Directors Association v. United States*, ____

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[1] Moreover, the Government in its Opposition does not seriously contend that such an issue would have been given more than cursory treatment; see Opposition, page 7, note 6. Furthermore, it is significant that the Tenth Circuit in its review treated the First Amendment question on the merits despite the alleged procedural defect.

[2] *Reconsideration of the Second Report and Order*, 6 FCC2d 309 at 310-311 (1967). [See Appendix D to Petition for Writ of Certiorari].

[3] *Buckeye Cablevision, Inc. v. Federal Communications Commission*, 387 F.2d 220, 225 (D.C. Cir., 1967); *Conley Electronics Corporation v. Federal Communications Commission*, 394 F.2d 620 (10th Cir., 1968) [officially reported subsequent to the filing of this Petition for Writ of Certiorari, wherein it appears as Appendix A]; *Wheeling Antenna Company v. Federal Communications Commission*, ____ F.2d ____, 12 Pike & Fischer RR2d 2018 (Fourth Circuit No. 11,649, February 28, 1968); and *Black Hills Video Corporation v. Federal Communications Commission*, ____ F.2d ____, 13 Pike & Fischer RR2d 2123 (Eighth Circuit No. 18,052, August 7, 1968). Except to the extent that these opinions may be construed to conflict with the Seventh Circuit opinion, discussed herein, there is no conflict among the circuits on the precise question at issue. However, First Amendment challenges to the non-duplication rule are currently pending in the Ninth Circuit in *Total Telecable, Inc. v. Federal Communications Commission* (No. 21,990) and *Great Falls Community TV Cable Co., Inc. v. Federal Communications Commission* (No. 22,393).

F.2d ____, 14 Pike & Fischer RR2d 2023 (Nos. 16369 and 16498-99, decided September 10, 1968), casts doubt upon the validity of this dogged reliance and invites a more critical examination of the scope of the *NBC* decision and the permissible extent of "reasonable regulation" which restricts the free exercise of constitutionally protected rights.

The Seventh Circuit decision overturns the Commission's "personal attack" regulations.[4] There, as here, the Commission defended challenges that its regulations infringe freedom of speech and press by relying upon *NBC v. United States*, 319 U.S. 190 (1943). As the Seventh Circuit makes clear, *NBC* is not *carte blanche* power to regulate when constitutional rights may be impinged. The Commission contends that so long as its regulation of television communications has a "reasonable" purpose in the public interest, the *NBC* doctrine insulates the regulatory action from First Amendment infirmity even though the same activity if applied to other media, such as newspapers, would offend the constitutional guarantee. Thus, in the context of the First Amendment, the broadcast media is said to have less constitutional protection than the printed media. The Seventh Circuit explains that this distinction in treatment between means of dissemination, *i.e.*, radio and newspapers, merely begs the question and requires a test of reasonableness in light of the First Amendment. The Court stated (slip opinion, pp. 24-25):

> The Commission argues (relying on *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943)) that "since radio is inherently not available to all, its use may be constitutionally regulated in the public interest." What the Commission urges upon this court is the argument that once the need for some regulation of radio and television

[4] 47 C.F.R. §§73.123, 73.300, 73.598, 73.679.

> licensees is recognized – to insure that broadcasting facilities are in the hands of those most qualified and to eliminate interference and other technical problems – it must follow that the Commission's power extends to the promulgation of other kinds of regulations. According to the Commission, a failure to make this concession results in the Commission's inability to impose any regulations, technical or otherwise. This argument begs the question at issue which is, whether the need for technical, financial, and ownership regulation of radio and television licensees sufficiently distinguishes this group from newspaper publishers so as to warrant sustaining the imposition of burdens on radio and television licensees which would be in flat violation of the first amendment if applied to newspaper publishers.

In the instant case, the Commission has not even attempted to demonstrate a valid distinction between television licensing and the printed media. Its position has been that, since it has authority to regulate radio and since the exercise of this authority has been in furtherance of its concept of the public interest, it need not consider the consequences of the regulation's limitation on free speech. We contend, on the other hand, that examination of reasonableness and the public interest in mass communications must begin with the First Amendment rather than stop short of it.

In *NBC*, Justice Frankfurter, after describing the chaos created by unlicensed broadcasting, devotes but one paragraph of his 37-page opinion to the First Amendment, and concludes that a denial of a license for a broadcast station in the public interest is not a denial of free speech. Implicit in this conclusion is the finding that radio licensing preserves and promotes free speech rather than restricts it, since if everyone were to broadcast no

one could be heard. The same rationale has no application to cable television since it occupies no spectrum space, nor does the non-duplication rule pretend to promote free speech.[5] *NBC* does not support application of a restraint on *reception* or cable distribution of programs merely because the program has been broadcast by a station duly licensed by the Commission. From the narrowly applicable statement in *NBC*, the Commission has asserted blanket authority to regulate public reception without regard to the First Amendment – a possible misconstruction of the opinion forewarned by Justice Murphy in his dissent, 319 U.S. at 228.

The Seventh Circuit has brought *NBC* back into perspective and casts the burden upon the Commission to justify the reasonableness and need for any regulation which limits the exercise of free speech. While we recognize that there is a difference between the precise issue before the Seventh Circuit (actual expression of opinions) and the issue in the instant case (distribution and broader competitive means for expression of opinion), the underlying legal principles and constitutional issue are the same, since both expression and means of distribution have been held to be equally deserving of constitutional protection.[6]

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[5] In fact, the reverse is true; CATV programming is largely free of the economic, social, and technical pressures of scarce frequency space. In the current state of the art, CATV can make available from 20 to 40 television channels – up to 50% of home receiver capacity, whereas the average number of operating commercial TV stations per television market is only 2.9.

[6] "The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute [and] the right to receive . . ." *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

We feel that the significance and ripeness of the question presented in this petition cannot be overstated. Television is fast becoming (if not already in fact) the dominant medium of mass communications. If precious constitutional guarantees are to be preserved only for the written word, free expression of ideas and access to divergent opinion may well be effectively removed from the great majority of Americans and thus from the process by which public opinion is formulated. Encouraging, protecting, and nurturing new means of distribution of news and information are essential to protect the public interest in a democratic society. Yet, distribution sources in the United States are narrowing rather than expanding – the decline in newspaper publication; network dominance in television; cross-ownership in radio, television and newspapers are all alarming aspects of this constriction. And the agency charged with protecting the public interest in the communications field, sensitive primarily to pressures from the conventional broadcast industry, devotes most of its limited attention to technical and parochial industry problems. Sensitive awareness to constitutional guarantees must be impressed upon the agency at this critical time when the regulative yoke is being fastened on the neck of a new industry with the means for facilitating virtually unlimited expression without spectrum limitation.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the petition, the writ of certiorari to the Tenth Circuit Court of Appeals should issue.

Respectfully submitted,

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